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MICHAEL RODAK, JR., CLERK

**In the
Supreme Court of the United States**

OCTOBER TERM, 1977

DONALD R. SMITH, Treasurer of Illinois, MICHAEL J. BAKALIS, Comptroller of Illinois, ROBERT M. WHITLER, Department of Revenue of Illinois, JOHN W. CASTLE, Director, Department of Local Government Affairs of Illinois,

Petitioners,

vs.

ROBERT H. SNOW, individually and on behalf of all other taxpayers, similarly situated, MARVIN E. SCHATZMAN, individually and on behalf of all other taxpayers of Cook County, Illinois, EDWARD J. ROSEWELL, as Treasurer and Ex-Officio Collector of Cook County, Illinois, STANLEY T. KUSPER, JR., as Clerk of Cook County, Illinois, THE COUNTY OF COOK, a body politic and corporate, ILLINOIS CENTRAL GULF RAILROAD CO., a Delaware Corporation,

Respondents.

*On Petition For A Writ Of Certiorari To The
Supreme Court of Illinois.*

**BRIEF OF RESPONDENTS COUNTY OF COOK,
EDWARD J. ROSEWELL, AND
STANLEY T. KUSPER, JR.
IN OPPOSITION**

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No. 77-310

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Respondents County of Cook, Edward J. Rosewell, and Stanley T. Kusper, Jr., submit that the Petition filed herein incorrectly construes the opinion of the Illinois Supreme Court (Petition at A. 1-A. 23) and seeks review of issues not properly placed before this Court.

REASONS FOR DENYING THE WRIT

THE ISSUES PRESENTED IN THE PETITION INVOLVE THE INTERPRETATION BY A STATE COURT OF A STATE STATUTE AND PRESENT NO SUBSTANTIAL FEDERAL QUESTION.

Contrary to the arguments presented in the Petition filed herein, the decision of the Illinois Supreme Court sought to be reviewed presents no conflict between state and federal statutes. In approving the Plan of Reorganization of the Illinois Central Railroad Company (Illinois Central) and the Gulf, Mobile and Ohio Railroad Company into a new entity, the Illinois Central Gulf Railroad Company (Gulf), the Interstate Commerce Commission made no attempt to determine the question of the transfer of Illinois Central's state charter tax obligations and immunities to Gulf. As the Illinois Supreme Court noted, such a determination was not necessary to effect the proposed transaction and, therefore, "the Commission's approval of the Plan did not operate to extend the otherwise invalid charter tax and concurrent exemptions to Gulf." (Petition at A. 19)

That the question of the charter tax immunities was not encompassed in the Commerce Commission's decision is evident in that the opinion of the Commission is totally devoid of any express discussion of the transfer of Illinois Central's immunities to Gulf. As the Illinois Supreme Court stated:

"This conclusion is further based on the fact that the Commission did not address, much less attempt to adjudicate, the question of such charter tax exemptions in its detailed, 76-page opinion approving the transfer. The Plan itself nowhere makes any explicit reference to the charter tax obligations of IC or of their trans-

fer to Gulf. . . . Further, no express reference to the charter tax exemptions is made anywhere in the Plan, the exhibits, or the opinion of the Commission." (Petition at A. 19-20)

The only state laws which were affected by the Commission's approval of the Plan of Reorganization were those enactments which would otherwise prevent the sale of Illinois Central and prohibit Gulf's ownership of the charter property. *Schwabacher v. United States*, 334 U.S. 182 (1948); *Seaboard Air Line R. R. v. Daniel*, 333 U.S. 118 (1948); 49 U.S.C. § 5(12). At the heart of the Commission's approval of the Plan was the dissolution of the Illinois Central Railroad Company. Included among the statutory findings of the Commission was:

"(c) the sale, assignment, and transfer of the properties of Illinois Central Railroad Company to Illinois Central Gulf Railroad Company, and the liquidation and dissolution of the Illinois Central Railroad Company, . . ." 338 I.C.C. 805, 879 (1971).

The Illinois Supreme Court correctly concluded that to the extent necessary to effect the Section 5(12) transaction, any state law which prohibited the dissolution of the Illinois Central Railroad Company was overridden. (Petition at A. 12) In so holding, the court below cited the pertinent sections of 49 U.S.C. § 5(11), now § 5(12), which provides:

"(A)ny carrier . . . participating in . . . any transaction approved by the Commission . . . shall have full power . . . to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction without invoking any approval under State authority; and any carriers . . . participating in a transaction approved or authorized under the provisions of

this section shall and they are relieved from the operation of . . . prohibitions of law, Federal, State or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for . . . , and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction. . . ." (Petition at A. 12)

Thus, the Illinois Business Corporation Act of 1933, Ill. Rev. Stat. ch. 32, § 157.160 (1975) and the Illinois Act to Increase the Powers of Railroad Corporations, Ill. Rev. Stat. ch. 114, § 166 (1975) were not a prohibition to the sale of the Illinois Central Railroad Company. This is particularly so since the Illinois Supreme Court refused to interpret these acts of the state legislature, 34 years or more after the enactment of the charter, to prohibit the sale. (Petition at A. 11)

The Plan of Reorganization was approved by the Interstate Commerce Commission on December 20, 1971, 338 I.C.C. 805 (1971), and carried out on or about August 10, 1972. (R. C939-940) On August 14, 1972, the Illinois Central Railroad Company tendered a certificate of dissolution to the Illinois Secretary of State. (R. C220) Without shareholders, officers, property, or the right to do business, the Illinois Central Railroad Company was dissolved by operation of law. *Rochester Ry. v. Rochester*, 205 U.S. 236 (1907). Although the petitioners herein deny such a dissolution, they made no attempt to litigate the issue prior to their appearance in the Illinois Supreme Court. Although the State was invited to participate in the hearings before the Commission as an interested party pursuant to Section 5(2)(b) notice, it failed to do so. And although the circuit court repeatedly requested the petitioners to file a counterclaim raising the dissolution, (R. C1081-1084, C1092) the State officials elected not to plead

the issue. (R. C1096-1097). Having waived their rights to litigate the dissolution issue before the Commerce Commission and in the state courts, and having failed to raise or preserve any Federal or Tenth Amendment question in the courts below, the petitioners may not now in this Court attempt for the first time to create a question of federal magnitude.

Approval of the Plan of Reorganization, including the dissolution of the Illinois Central Railroad Company, being the only question properly before the Interstate Commerce Commission and necessary for the effectuation of the Plan, it remained for the state courts to determine the impact of the Reorganization on the state taxation scheme. *Thomson v. Union Pac. R. R.*, 76 U.S. (9 Wall.) 579 (1870); *People ex rel. Schuler v. Chapman*, 370 Ill. 430, 19 N.E. 2d 351 (1937). That determination was purely a matter of state law, a determination of the proper method for the State of Illinois and its political subdivisions to exact taxation from a railroad owning property and operating within the state. The interpretation by the Illinois Supreme Court that the tax exemption and charter tax granted Illinois Central were personal to it and not transferable to Gulf is in accord with the entire body of law which has examined railroad charter rights. *Yazoo & Mississippi Valley R.R. v. Vicksburg*, 209 U.S. 358 (1908); *Rochester Ry. v. Rochester*, 205 U.S. 236 (1907); *Yazoo & Mississippi Valley R.R. v. Adams*, 180 U.S. 1 (1901); *Chesapeake & O. Ry. v. Miller*, 114 U.S. 176 (1885); *St. Louis, Iron Mountain & S. Ry. v. Berry*, 113 U.S. 465 (1885); *Memphis & Little Rock R.R. v. Berry*, 112 U.S. 609 (1884); *Louisville & Nashville R.R. v. Palmes*, 109 U.S. 224 (1883); *Wilson v. Gaines*, 103 U.S. 417 (1881); *Atlantic & Gulf R.R. v. Georgia*, 98 U.S. 359 (1879); *Morgan v. Louisiana*, 93 U.S. 217 (1876); *Cincinnati, Ind. & W. R.R. v. Barrett*, 406 Ill. 499, 94 N.E. 2d 294 (1950). That interpreta-

tion of Illinois Central's charter by the state supreme court is conclusive. *Cramp v. Board of Public Instruction*, 368 U.S. 278 (1961); *Kingsley International Pictures Corp. v. Regents*, 630 U.S. 684 (1959); *Atchison, T. & S.F. Ry. v. Railroad Commission*, 283 U.S. 380 (1931). This Court should, therefore, decline to review the Illinois Supreme Court's interpretation of the charter of the former Illinois Central Railroad Company.

CONCLUSION

For the foregoing reasons, respondents County of Cook, Edward J. Rosewell, and Stanley T. Kusper, Jr., respectfully pray that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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